

**SOAH DOCKET NO. 582-09-2895
TCEQ DOCKET NO. 2008-1305-MWD**

APPLICATION OF FARMERSVILLE	§	BEFORE THE STATE OFFICE
	§	
INVESTORS, LP, FOR TPDES	§	OF
	§	
PERMIT NO. WQ0014778001	§	ADMINISTRATIVE HEARINGS

RESPONSE TO EXCEPTIONS ON REMAND

Applicant, Farmersville Investors, LP (“Farmersville” or “Applicant”) files its Response to the exceptions to proposal for decision (PFD) filed by the Executive Director (“ED”) of the Texas Commission on Environmental Quality (“TCEQ”) and by James A. and Shirley Martin (“Martins” or “Protestants”), respectfully showing:

I. REMAND ON SPECIFIC ISSUES

On December 16-17, 2009, Administrative Law Judge (“ALJ”) Sharon Cloninger conducted an evidentiary hearing on Farmersville’s application for TPDES Permit No. WQ0014778001 (the “Application”). The ALJ provided a PFD recommending issuance of the requested permit. The Commissioners of the TCEQ (the “Commissioners”) considered the PFD, exceptions and oral argument at its agenda on June 16, 2010.

Section 80.265 of the Commission’s rules allows the Commission “to reopen the record for further proceedings *on specific issues* in dispute.”¹ (Emphasis added.) If the Commission chooses to do so, the rule requires the Commission to enter an order that shall “include instructions as to the subject matter of further proceedings and the judge’s duties in preparing supplemental materials or revised orders based upon those proceedings for the commission’s adoption.”²

¹ 30 TEX ADMIN CODE §80.265.

² The rules of the TCEQ also mandate: “When a case is referred to SOAH, only those issues referred by the commission or added by the judge under § 80.4(c)(16) of this title (relating to Judges) may be considered in the hearing.” 30 TEX. ADMIN CODE § 80.6(d).

On June 22, 2010, the Commissioners issued an Interim Order (the “Interim Order”) remanding this case back to the State Office of Administrative Hearings (“SOAH”). Pursuant to 30 TAC § 80.265, the Interim Order identified specific issues and provided instructions for further proceedings and the judge’s duties in preparing supplemental materials or revised orders as follow:

1. Take additional evidence on whether the outfall will discharge into an intermittent stream or directly into Lavon Lake;
2. Should the ALJ determine from the evidence that the outfall will discharge directly into Lavon Lake, take additional evidence as to whether the effluent limits in the Draft Permit will meet the requirements of 30 TAC ch. 307, and if not, take additional evidence as to what effluent limits are necessary to meet the requirements of 30 TAC ch. 307;
3. Upon an offer into evidence, consider the admission into the record of the final February 2010 Wastewater Feasibility Report; and
4. Make recommended Findings of Fact and Conclusions of Law to the Commission on the above evidentiary issues.

As to enumerated items 1 and 2; the Commissioners clearly requested that a determination first be made whether the proposed outfall will discharge into an intermittent stream or into Lavon Lake. **Only if** the discharge is into Lavon Lake should the ALJ consider the questions posed in item 2. The ED’s staff understood that this was what the Commissioners were looking for.³

Item 3 is the second charge to SOAH. The Commissioners directed the ALJ to consider admitting into the record the February, 2010 Wastewater Feasibility Report upon an offer into evidence. A copy of the February, 2010 Wastewater Feasibility Report was offered and then accepted into evidence as Martin Exhibit 40.⁴ The Commissioners’ charge to the ALJ under 30 TEX. ADMIN CODE § 80.265 did not request further argument or briefing regarding the originally

³ Tr. pg. 296, ln. 17 through pg. 297, ln. 6 (Michalk).

⁴ Tr. pg. 208, ln. 11 through pg. 209, ln. 18.

referred issue of regionalization. It did, however, direct the ALJ to recommend Findings of Fact and Conclusions of Law to the Commission on the specified evidentiary issues.

II. EVIDENCE REGARDING REMANDED ISSUES

The ALJ conducted an evidentiary hearing on the remanded issues on November 29-30, 2010. At that time, evidence was presented that Applicant had performed a detailed survey to determine the location of the 492 foot elevation contour of Lavon Lake to determine the reach of the Lake at “normal pool” elevation.⁵ The detailed survey also determined the route of the thalweg of the intermittent stream from the point of discharge to the point where it reached Lavon Lake at the 492 foot elevation contour.⁶ The detailed survey and the testimony of qualified experts demonstrate conclusively that the discharge is to an intermittent stream, and that the intermittent stream flows 638 feet from the discharge point before it reaches Lavon Lake at its “normal pool” elevation.⁷

The Commission’s Order only required a consideration of whether the effluent limitations set forth in the Draft Permit will meet the requirements of 30 TEX. ADMIN. CODE ch. 307 if the ALJ first finds that the discharge is directly to Lavon Lake.⁸ The evidence is clear that the discharge is *not* directly to Lavon Lake, but to an intermittent stream. However, Mr. James Michalk, the computer modeler for the ED, did perform computer modeling of the intermittent stream based on the new and more site specific details of the intermittent stream conditions.⁹ The new computer modeling confirms that the effluent limitations set forth in the Draft Permit will

⁵ E.g.: Tr. pg. 14, ln. 3 through pg. 16, ln. 11; pg. 17, ln. 22 through pg. 18, ln. 18 (McCullah); pg. 137, ln. 11 through pg. 138, ln. 1; pg. 140, ln. 1 through pg. 141, ln. 5; pg. 146, ln. 24 through pg. 147, ln. 16 (Young). The survey was admitted as Exhibit APP-18. Tr. pg. 139, lns. 13 through 24.

⁶ E.g.: Tr. pg. 18, ln. 20 through pg. 22, ln. 5 (McCullah); pg. 138, lns. 2 through 6; pg. 141, ln. 6 through pg. 143, ln. 22 (Young); pg. 299, ln. 13 through pg. 300, ln. 8 (Michalk).

⁷ E.g.: Tr. pg. 23, ln. 16 through pg. 24 ln. 6 (McCullah); pg. 147, ln. 18 through pg. 149, ln. 10 (Young); pg. 299, ln. 13 through pg. 300, ln. 8 (Michalk).

⁸ Tr. pg. 149, ln. 11 through pg. 150, ln. 2. (Young); see also, TCEQ Interim Order, *supra*.

⁹ E.g.: Tr. pg. 150, lns. 3 through 8; Tr. pg. 150, ln. 15 through pg. 151 ln. 16 (Young); pg. 299, ln. 13 through pg. 300, ln. 8 (Michalk).

meet the requirements of 30 TEX. ADMIN. CODE ch. 307 under the new detailed survey information about the intermittent stream.¹⁰

The testimony of all witnesses competent to testify as to whether the effluent limitations contained in the Draft Permit would meet the requirements of 30 TEX. ADMIN. CODE ch. 307 clearly shows that the effluent limitations in the Draft Permit will indeed meet those requirements.¹¹

III. PROPOSAL FOR DECISION ON REMANDED ISSUES

On February 7, 2011, ALJ Sharon Cloninger issued an amended PFD. To minimize confusion and avoid a re-reading of the original PFD, Proposal for Decision, the ALJ issued the Amended Proposal for Decision addressing all issues in the case, including those not subject to the remand.¹²

REMANDED ITEM 1.

The ALJ considered the site specific survey of the discharge point, discharge route and the shoreline of Lavon Lake at its normal pool elevation. The information available to the ALJ in making her findings and recommendations was of a quality superior to the type of data the ED normally has available for his review.¹³ The information was in the top 5 of the 1300 wastewater discharge projects Mr. James Michalk, has ever had available to him.¹⁴ Based on this extraordinary evidence and the complete absence of any countervailing evidence from Protestants or otherwise, the ALJ concluded:

The ALJ finds that Applicant's survey of the discharge route provided more detailed information than the ED usually receives and the survey data was

¹⁰ E.g.: Tr. pg. 156, ln. 15 through pg. 157, ln. 10 (Young); pg. 301, lns. 2 through 12 (Michalk).

¹¹ E.g.: Tr. pg. 156, ln. 15 through pg. 157, ln. 10 (Young); Tr. pg. 156, ln. 15 through pg. 157, ln. 10 (Young); pg. 301, lns. 2 through 12 (Michalk).

¹² Amended Proposal for Decision, Page 1.

¹³ Amended Proposal for Decision, Page 13.

¹⁴ Amended Proposal for Decision, Page 14.

sufficient to determine that there is a high point along the intermittent stream that prohibits water from Lavon Lake from reaching the proposed outfall when the lake is at normal pool elevation. The ALJ further finds that if the lake is above normal pool elevation and reaches the outfall site, the Farmersville discharge will be into standing water that is part of the intermittent stream, even if the water is connected to the lake.¹⁵

REMANDED ITEM 2.

While agreeing that the discharge will be to an intermittent stream and not to Lavon Lake, the ED presented evidence at the remand proceeding as to what effluent limits are necessary to meet the requirements of 30 TEX. ADMIN. CODE, ch. 307, given that the discharge will be to an intermittent stream. Based on the testimony of Mr. Michalk and Applicant's witness Dr. Young, and the absence of any evidence to the contrary from Protestants,¹⁶ the ALJ concluded:

[T]he ALJ finds that the discharge from the proposed wastewater treatment plant will be to an intermittent stream and will flow 638 feet before it reached the Elm Creek arm of Lavon Lake in Segment 0821 at its normal pool elevation of 492 feet above msl.

The ALJ finds that based on the anti-degradation review performed by Ms. Murphy and the original and refined computer modeling performed by Mr. Michalk, the proposed DO levels in the unnamed tributary and Lavon Lake will be maintained and existing water quality uses will be protected. In addition, the ALJ finds that the effluent limitations contained in the Draft Permit satisfy the requirements of 30 TAC ch. 307.¹⁷

REMANDED ITEM 3.

Pursuant to the Interim Order, Protestants offered the *February 2010 Wastewater Feasibility Report* into evidence that was admitted into evidence without objection from any party. The *February 2010 Wastewater Feasibility Report* changed nothing in terms of whether

¹⁵ Amended Proposal for Decision, Pages 14-15.

¹⁶ The ALJ notes: "Protestants did not produce any credible evidence to attack the validity of the effluent limitations produced by the original model, the original model itself, the unchanged effluent limitations produced by the refined model, the refined model itself, or the process employed by Mr. Michalk to generate either model. Protestants counsel elicited testimony from Mr. Michalk on cross-examination that confirmed Mr. Michalk was correct to be thorough and evaluate the outfall in light of the site-specific information." Amended Proposal for decision, Pages 20-21.

¹⁷ Amended Proposal for Decision, Pages 26-27.

there is a regional wastewater treatment facility, whether existing or proposed, available to serve the needs of the Farmersville development. The ALJ concluded:

The ALJ agrees with Applicant that no evidence of an existing or proposed area-wide or regional waste collection, treatment, or disposal system was presented. Therefore, the Application meets the requirements of TWC § 26.0282.¹⁸

REMANDED ITEM 4.

Item 4 of the Interim Order provided specific “instructions as to the subject matter of further proceedings and the judge’s duties in preparing supplemental materials or revised orders based upon those proceedings for the commission’s adoption” pursuant to the Commission Rule regarding reopening of the record.¹⁹ Pursuant to the Interim Order, the ALJ provided Findings of Fact and Conclusions of Law related to the remanded evidentiary issues and incorporated them into a proposed Order granting the permit and providing Findings of Fact and Conclusions of Law on all issues, including those of the original referral to SOAH.

IV. EXCEPTIONS

The ED filed “Executive Director’s Exceptions to the Proposal for Decision on Remand” (“ED’s Exceptions”) and the Protestants filed “Protestants James A. and Shirley Martin’s Exceptions to the Proposal for Decision Following the Remand Hearing” (Protestants’ Exceptions”).

ED’S EXCEPTIONS.

The ED is in overall agreement with the ALJ’s PFD and Order but provides recommendations for two changes to the PFD, five changes to Findings of Fact and one typographical correction to the Ordering Provisions of the Order. None of the proposed changes

¹⁸ Amended Proposal for Decision, Page 41.

¹⁹ The rules of the TCEQ also mandate: “When a case is referred to SOAH, only those issues referred by the commission or added by the judge under § 80.4(c)(16) of this title (relating to Judges) may be considered in the hearing.” 30 TEX. ADMIN CODE § 80.6(d).

alter the ultimate conclusions that the Applicant has satisfied all requirements of the Texas Surface Water Quality Standards and is entitled to issuance of the requested permit. All of the changes recommended by the ED are for the sake of clarity, are supported by the record, and are consistent with the Texas Surface Water Quality Standards and Implementation Procedures.

As regards Findings of Fact 25, 26, 27, and 28, each item is within the subject area of the remanded issues referred to SOAH by the Interim Order. The revision to Ordering Provision 1 is a mere typographical correction. Applicant supports the changes and corrections recommended by the ED with regard to Findings of Fact 25, 26, 27, and 28 and Ordering Provision 1.

However, the ED's recommendation in Finding of Fact 40, concerning submission of a summary submittal letter rather than design plans and specifications, consistent with the requirements of 30 TEX. ADMIN. CODE § 217.6, is not within the subject matter of the remanded issues referred by the Interim Order.

The Office of Public Interest Counsel ("OPIC") has filed a response to the ED's Exceptions recommending against acceptance of the ED's recommendation on Finding of Fact 40. OPIC recommends correcting the reference from Chapter 307 to Chapter 217, but objects to the ED's recommendation that a correction be made to reflect the procedure specified in 30 Tex. Admin. Code § 217.6 providing for initial submission of a summary submittal letter.

Applicant believes that no changes should be made to Finding of Fact 40 because it was not within the reach of the remanded issues. Applicant disagrees and disputes OPIC's basis and reasoning for its recommendation. OPIC states that Protestants raised the issue of compliance with 30 TEX. ADMIN. CODE § 217.328(d) in its comments on the application. Applicant has carefully reviewed Protestants' comments and can find no such comment was made. More importantly, compliance with 30 Tex. Admin. Code § 217.328(d) was never a referred issue.

The record is clear that the road is out of the flood-plain. Applicant briefed this issue with references to exhibits and testimony extensively in its Response to Closing Arguments and Response to Exceptions for the original proceeding. Please refer to those documents for a more extensive explanation of why compliance with 30 TEX. ADMIN CODE, ch. 217 was never properly before the TCEQ or SOAH, and why the evidence shows that there will be all weather access to the site.

Finding of Fact 40 is only a finding of fact, it is not an ordering provision. Altering Finding of Fact 40 to accurately reflect the requirements of 30 Tex. Admin. Code, ch. 217, and specifically the summary letter submission requirements of 30 Tex. Admin Code § 217.6 as recommended by the ED would provide a more accurate finding. Moreover, whether it be through a summary submittal letter or through detailed plans and specifications, Farmersville will be required to demonstrate that it has all weather access, along with satisfying the many other requirements of Chapter 217.

PROTESTANTS' EXCEPTIONS

While titled “exceptions”, Protestants’ Exceptions are anything but proper exceptions. Protestants’ “exceptions” do not identify any specific Finding of Fact, Conclusions of Law or discussion in the Proposal for Decision to which Protestants take exception. Rather, Protestants’ arguments comprise a rambling brief reaching far outside of the record and the issues referred on remand to recommend policies; and changes to supposed policies in order to revamp the Texas Surface Water Quality Standards and Implementation Procedures in order to create mechanisms to deny Farmersville’s application. Protestant’s do recommend a new and completely alternative set of Findings of Fact and Conclusions of Law and recommend that the Commission set precedent by issuing an order denying the permit.

Denial of Applicant's permit for the reasons espoused by Protestants would certainly set precedent. However, the precedent would be that an Applicant that has demonstrated by the overwhelming weight of the evidence that it has satisfied all requirements of the Texas Surface Water Quality Standards and Implementation Procedures can be denied its permit for arbitrary reasons not supported by any rule or regulation based on policies established through *ad hoc* rulemaking. Tex. Water Code § 5.103(c)²⁰ prohibits the TCEQ from establishing policy through *ad hoc* rulemaking. Even if the Commission were allowed to establish policy through contested case decisions, it should reject the policies championed by Protestants as they promote fantasy over reality and would drag the Commission's permitting program into vague and uncertain waters.

Protestants' arguments and the supposed policies they advance are not supported by the record. The rules of SOAH require that a party relying on a specific agency policy not incorporated in a rule has the burden of authenticating the policy and showing it to be applicable to a factual or legal issue in the case.²¹ Protestants did not present any evidence of the existence of policies they claim the Commission should adhere to. Nor do Protestants' arguments find factual support in the record. In the PFD, the ALJ repeatedly finds that Protestants provided no evidence whatsoever to support the claims they made regarding the nature of the receiving waters or otherwise.

What the ALJ does find is that the Applicant presented evidence of any extraordinarily high quality to prove (1) that its proposed discharge will be to an intermittent stream, and that the treated effluent will travel 638 feet before reaching Lavon Lake at its normal pool elevation; and

²⁰ "Rules shall be adopted in the manner provided by Chapter 2001, GOVERNMENT CODE. As provided by that Act, the commission must adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy or describes the procedure or practice requirements of an agency. The commission shall follow its own rules as adopted until it changes them in accordance with that Act."

²¹ 1 TEX. ADMIN. CODE § 155.419(a).

(2) that the effluent standards contained in the Draft Permit will satisfy the Texas Surface Water Quality Standards and be protective of existing uses of Lavon Lake and of the intermittent stream itself. These are the Findings of Fact and Conclusions of Law on issues that the ALJ was directed to investigate by the Interim Order of Remand. Most of the issues that Protestants raise in their Exceptions are not relevant to the remanded issues, and many are not even relevant to the originally referred issues.

A. Protestants' Exception – Speculation by Applicant

Protestants assert that Farmersville's permit should be denied because the Applicant has not demonstrated that it owns the location of the discharge point. This is not relevant to any referred issue. Protestants rely on a letter that was not admitted into the record. 1 TEX. ADMIN. CODE §155.429(5) provides: "Excluded exhibits. An exhibit excluded from evidence will be considered withdrawn by the offering party and will be returned to the party, unless the party makes an offer of proof in accordance with the Texas Rules of Evidence." Protestants made no offer of proof on this Exhibit and it is improper for Protestants to even refer to it in their Exceptions.²² Moreover, the TCEQ has no jurisdiction over property rights and the Draft Permit provides that the grant of the permit does not convey property rights.²³ If Farmersville is not able to acquire the property right to place its outfall structure at the discharge point as described in the permit, it will not be able to discharge. But that issue is best left to be addressed in a different forum.

B. Protestants' Exception – Important Precedent that will be Set

²² TEX. RULE OF CIVIL PROCEDURE 269(e). "Counsel shall be required to confine the argument strictly to the evidence and the arguments of opposing counsel." TEX. R. APP. PROCEDURE 38.1(F); *See e.g.*, *Mortgage Co. of America v. McCord*, 466 S.W.868 (Tex. Civ. App. Houston [14th Dist.] 1971, writ refused n.r.e.).

²³ Exhibit 5, Draft Permit, Permit Condition 8.

Protestants concede that it is the Commissioners who are charged as the policy makers of the agency. Applicant agrees. Protestants ask the Commissioners to make new policy regarding (1) allocation of state resources, (2) property rights, (3) water supplies, and (4) the legislative directive to promote regionalization. As discussed above, the Commission is not allowed to set policy on these or any other matters through decisions in contested case hearings, but is required to prescribe policy through rule-making. Applicant will respond to the specific defects of Protestants arguments on these “precedential” matters where raised in other sections of their brief.

C. Protestants’ Exception – Water Quality Based on Outfall Location

Protestants essentially concede that the site specific survey performed by Applicant conclusively demonstrates that the proposed discharge will be to an intermittent stream and that it will travel 638 feet before reaching Lavon Lake at its normal pool elevation of 492 feet msl. But Protestants ask the Commissioners to set those essential facts aside and rely instead on maps of the U.S. Army Corps of Engineers and Texas Department of Transportation that contradict the reality of the area as demonstrated by the survey information.

Most of Protestants’ arguments derive from Protestants flawed argument that the best evidence of what constitutes the shoreline of Lavon Lake is the Corps of Engineers map that was admitted as Protestants’ Exhibit 50. This map is dated August 4, 1969, and predates the raising of Lavon Lake to 492 feet normal pool elevation by some 5 to 6 years.²⁴ This “Project Map” was developed for property tract information rather than specific aspects of the lake.²⁵ Counsel for Protestants repeatedly attempted to have Mr. Michalk use the map and pretend “you had no

²⁴ The lake level was raised in 1974 or 5. See, e.g.; Tr., pg. 224, lns. 7-14 (Martin).

²⁵ E.g., Tr. Pg. 327, lns. 16 through 25 (Michalk).

reason to think it was incorrect”²⁶ Mr. Michalk would have none of it.²⁷ Site specific information is always preferable.²⁸ The information provided by Applicant to the TCEQ to allow Mr. Michalk to make his determinations was of a quality far above the vast majority of cases where those determinations are made.²⁹

There is no evidence to suggest, and no logic to assume, that the Corps map (and the TxDOT maps derived therefrom) was intended to establish the shoreline of the lake for future permitting of wastewater treatment plant discharges. Moreover, if the TCEQ were to accept maps that contradict the known geometry of receiving waters, its computer modelers would be forced to make assumptions that contradict reality in order to determine the effluent limitations for such discharges. This cannot be a proper way to assure the protection of the quality of the waters of the State of Texas.

While Protestants’ arguments are logically and factually flawed, they are also legally flawed because the Commission is prohibited from prescribing or altering rules or policies through contested case hearing decisions. Lavon Lake is defined in the Texas Surface Water Quality Standards as “from Lavon Dam in Collin County up to the normal pool elevation of 492 feet (impounds East Fork Trinity River)”.³⁰ Acceptance of Protestants’ argument would require the Commission to amend this rule to say that the lake is defined as shown on some map created by a different agency. The Commission cannot amend this rule through a contested case hearing decision.

Protestants also repeatedly refer to some “blockage” of the intermittent stream that is somehow altering the natural conditions to create an intermittent stream where a cove would

²⁶ *E.g.*, Tr. pg 328, ln. 1 through pg. 329, ln. 1(Michalk).

²⁷ *Id.*

²⁸ Tr. pg. 408, lns. 7 through 25 (Michalk).

²⁹ Tr. pg. 321, lns. 5 through 20; pg. 444, lns. 18 through 25; pg. 457, ln 12 through pg. 460, ln. 5 (Michalk).

³⁰ 30 TEX. ADMIN. CODE § 307.10(3)

naturally exist. Protestants cite the testimony of Mr. McCullah for the statement that “something happened to create the blockage about 492”.³¹ He said no such thing, despite Counsel’s hypothetical questioning:

Q OK. And do you have any doubt that if that was the 492 contour line, if those were accurate, that in the past that creek ran downhill and stayed below 492 all the way from the outfall to the lake?

A That’s assumable.

Q. That’s a reasonable assumption?

A. (Nodded)

Q Okay. Something happened. If that was correct, the USGS map and the TxDOT maps were correct, something happened to create an elevation above 492 within that finger?

A Yes, sir.

(Emphasis added.) And if the USGS, TxDOT and Corps of Engineers maps are wrong about the shoreline of Lavon Lake, nothing was done to create some blockage. To the extent Protestants claim the TxDOT, USGS and Corps of Engineers maps show some cove near the discharge point, those maps are wrong now and they have been wrong since 1969. That is why the TxDOT and Corps maps are not used for the purposes of establishing shorelines or elevations or to determine the characteristics of receiving waters. In fact, TxDOT maps include a disclaimer on them stating that they have no official status.³²

Protestants offered no evidence of their own, and were unable to elicit testimony from any qualified witness on cross-examination to support their theory that there is some temporary blockage that could be washed away. The overwhelming weight of the evidence is that the discharge is to an intermittent stream and that the treated effluent will travel 638 feet before reaching Lavon Lake at its normal pool elevation of 492 feet msl, as defined in the Commission Rules.

³¹ Protestants’ Closing Argument, pgs. 11-12.

³² Tr. pg. 155, lns 1 through 6 (Young)

D. Protestants' Exception – Siting Requirements

Protestants raise several “areas of concern” related to the issue originally referred to SOAH as issue 2. That Issue bears repeating: “Whether the Draft Permit complies with siting requirements for the proposed facility location including the discharge point, discharge route and the buffer zone requirements.” Protestants re-argue their failed claims from the original evidentiary hearing and proposal for decision: *i.e.*: There is no all-weather road access situated above the 100 year flood plain. Applicant is required to demonstrate satisfaction of Chapter 217 design criteria in order to receive a Chapter 307 permit. As discussed earlier, Applicant will be required to demonstrate all weather access wither through a summary submittal letter or with submission of its engineering plans and specifications. Protestants also argue that Applicant should be required to demonstrate property ownership of the discharge point.

These issues were briefed substantially after the original hearing. Applicant will not re-brief those arguments here. No aspect of these issues or sub-issues was referred back to SOAH by the Interim Order. More importantly, Protestants showed no evidence that was developed during the remand proceedings that changes the circumstances bearing on the issues.

E. Protestants' Exceptions – Regionalization

Pursuant to 30 TEX. ADMIN. CODE § 80.256, the Commissioners re-opened the hearing on Farmersville’s application with instructions as to the subject matter of further proceedings and the judge’s duties in preparing supplemental materials or revised orders based upon those proceedings for the Commission’s adoption. Item 3 of the Interim Order re-opening the record was: Upon an offer into evidence, consider the admission into the record of the final *February 2010 Wastewater Feasibility Report*. Protestants offered the *February 2010 Wastewater Feasibility Report* into evidence. No party objected and the Report was admitted into evidence. That is the end of the matter. Protestants, however, chose to reargue all of their prior argument

regarding regionalization, but without reference to evidence developed in the remand proceeding or the original proceeding.

Moreover, they argue based on a claimed policy of the Commissioner that was not substantiated by evidence in the record. Existing policy of the Commission can **only** be considered if it is based on evidence of that policy. The only evidence asserted by Protestants was a decision of the Commission in what Protestants refer to as the *Lake Travis II* case. That decision was not admitted in the record as it was irrelevant. Pursuant to 1 TEX. ADMIN. CODE § 155.429(5): “An exhibit excluded from evidence will be considered withdrawn by the offering party and will be returned to the party, unless the party makes an offer of proof in accordance with the Texas Rules of Evidence.” Protestants made no offer of proof regarding Martin Exh. 40. As explained earlier, it would be improper for the Commission to adopt the policies regarding regionalization suggested by Protestants in a decision on a contested case hearing. Policy is to be made or altered by rule-making.

Even if the Commission goes down the rabbit hole of Protestants’ regionalization claims, the record (as it actually exists) has been unaltered by the *February 2010 Feasibility Report*. As previously demonstrated, there is no **existing** areawide or regional collection, treatment, or disposal systems available to treat the waste from the proposed Farmersville development. There is no **proposed** areawide or regional waste collection, treatment or disposal system that would be available to treat the waste from the proposed Farmersville development.³³ The Applicant, the ED and the Commission have satisfied Texas Water Code § 26.0282 by considering the availability of **existing** or **proposed** areawide or regional waste collection, treatment, and disposal systems.

³³ Exh. APP-2, KK-8.

A draft of the Feasibility Report was already in evidence when Protestants made their regionalization arguments. In all of their re-hashed arguments regarding regionalization, Protestants fail to suggest how the *February 2010 Wastewater Feasibility Report* changes anything. The 2010 Report does not make a regional plant *available*. The 2010 Report does not *propose* a regional plant. All it does is consider the feasibility of various regional options. Protestants do not suggest a single factor related to a regional plant's availability or prospects that is changed by the existence of the 2010 Report *vis-à-vis* the draft report previously briefed.

F. Protestants' Exceptions – Protestants' Health and Property.

Like their issues regarding siting, Protestants are re-hashing their failed arguments from the original proceeding in this remand proceeding where no element of the issues was remanded to the ALJ. Protestants make grand proclamations about how the water will back up some 700 feet onto Protestants' property and contaminate their well (which has been abandoned and should be plugged, as shown in the original proceeding). Protestants make these claims with virtually no reference to the record, and without any reference what-so-ever to testimony of any witness, expert or other-wise.

Protestants are again asking the Commission to engage in policy making through a decision in a contested case hearing rather than through rule-making, and without any evidence contained within the record to support such a policy. This is prohibited by Texas Law.

G. Protestants' Exceptions – Evidentiary Issues

Protestants suggest that the Applicant made erroneous arguments on evidentiary matters during the course of the remanded hearing. Protestants complain that their Exhibit 48 was not admitted over a hearsay objection.³⁴ This is not true. Applicant objected to Exhibit 48 based on

³⁴ Protestants' Closing Argument, pg. 42.

relevance, not hearsay grounds and relevance was the basis of the ALJ's ruling.³⁵ Protestants also complain that their Exhibit 26 was not admitted in the original hearing. Protestants offered both exhibits to support their argument that Applicant may not use property of the Corps of Engineers for their discharge location. The ALJ correctly ruled that property ownership of the outfall location is irrelevant as the Commission does not have jurisdiction over such property issues. This matter was fully briefed after the original hearing. The Commissioners did not remand any issue related to property ownership back to the ALJ.

Protestants also complain that testimony by Mr. Martin regarding his measurements of distances of certain features in the vicinity of the discharge point was not allowed. Mr. Martin was identified as a lay witness. It was offered to rebut the expert testimony provided by a surveyor who had conducted a site specific survey. Mr. Martin's testimony was not useful or relevant. His testimony was offered on matters requiring expertise that he did not possess. The testimony was properly excluded.

Protestants also complain that counsel for Applicant objected to the various maps of the Corps and TxDOT, while acknowledging that the maps were admitted into evidence. Protestants proclaim that these errors must be fixed! But Protestants' maps were admitted into evidence and Protestants relied on them heavily for most of their arguments. Even though Protestants' maps are inaccurate and unhelpful, there is no evidentiary ruling that needs to be fixed.

V. CONCLUSION

Applicant performed a detailed survey to determine the location of the 492 foot elevation contour of Lavon Lake to determine the reach of the Lake at "normal pool" elevation.³⁶ The

³⁵ Tr. pg. 172, ln. 25 through pg. 175, ln. 11.

³⁶ E.g.: Tr. pg. 14, ln. 3 through pg. 16, ln. 11; pg. 17, ln. 22 through pg. 18, ln. 18 (McCullah); pg. 137, ln. 11 through pg. 138, ln. 1; pg. 140, ln. 1 through pg. 141, ln. 5; pg. 146, ln. 24 through pg. 147, ln. 16 (Young).

detailed survey also determined the route of the thalweg of the intermittent stream from the point of discharge to the point where it reached Lavon Lake at the 492 foot elevation contour.³⁷

Exhibit APP-18 and the testimony of qualified experts demonstrate conclusively that the discharge is to an intermittent stream, and that the intermittent stream flows 638 feet from the discharge point before it reaches Lavon Lake at its “normal pool” elevation.³⁸ The TCEQ Interim Order only required a consideration of whether the effluent limitations set forth in the Draft Permit will meet the requirements of 30 TEX. ADMIN. CODE ch. 307 if the ALJ first finds that the discharge is directly to Lavon Lake.³⁹ The evidence is clear that the discharge is not directly to Lavon Lake. However, Mr. James Michalk, the computer modeler for the Executive Director, did perform computer modeling of the intermittent stream based on the new and more site specific details of the intermittent stream conditions.⁴⁰

The new computer modeling confirms that the effluent limitations set forth in the Draft Permit will meet the requirements of 30 TEX. ADMIN. CODE, Ch. 307 under the new detailed information about the intermittent stream.⁴¹ The testimony of all witnesses competent to testify as to the nature of the receiving water body shows that the discharge is to an intermittent stream and then to Lavon Lake, and that the uses of that stream and lake will be protected.⁴²

The Protestants have failed to produce any relevant evidence to contradict the evidence presented by the Applicant (Mr. David McCullah and Dr. Jonathan Young) and by the Executive

³⁷ E.g.: Tr. pg. 18, ln. 20 through pg. 22, ln. 5 (McCullah); pg. 138, lns. 2 through 6; pg. 141, ln. 6 through pg. 143, ln. 22 (Young); pg. 299, ln. 13 through pg. 300, ln. 8 (Michalk).

³⁸ E.g.: Tr. pg. 23, ln. 16 through pg. 24 ln. 6 (McCullah) pg. 147, ln. 18 through pg. 149, ln. 10 (Young); pg. 299, ln. 13 through pg. 300, ln. 8 (Michalk).

³⁹ Tr. pg. 149, ln. 11 through pg. 150, ln. 2. (Young); see also, TCEQ Interim Order.

⁴⁰ E.g.: Tr. pg. 150, lns. 3 through 8; Tr. pg. 150, ln. 15 through pg. 151 ln. 16 (Young); pg. 299, ln. 13 through pg. 300, ln. 8 (Michalk).

⁴¹ E.g.: Tr. pg. 156, ln. 15 through pg. 157, ln. 10 (Young); pg. 301, lns. 2 through 12 (Michalk).

⁴² E.g.: Tr. pg. 23, ln. 16 through pg. 24 ln. 6 (McCullah) pg. 147, ln. 18 through pg. 149, ln. 10; Tr. pg. 156, ln. 15 through pg. 157, ln. 10 (Young); pg. 299, ln. 13 through pg. 300, ln. 8; pg. 301, lns. 2 through 12 (Michalk).

Director (Mr. James Michalk) that the proposed discharge will be to an intermittent stream and that the proposed discharge will meet the requirements of 30 TEX. ADMIN. CODE ch. 307.

VI. PRAYER

WHEREFORE, Applicant requests that the ALJ amend the initial Proposal for Decision to incorporate the recommended clarifications contained in the Exceptions filed by the Executive Director. Applicant further requests that the Commissioners accept and adopt the ALJ's Proposal for Decision with the changes recommended by the ALJ and support the approval of the Application and the issuance of Draft TPDES Permit No. WQ0014778001.

Respectfully submitted,

LLOYD GOSSELINK

ROCHELLE & TOWNSEND, P.C.

816 Congress Ave., Suite 1900

Austin, Texas 78701

(512) 322-5800

(512) 472-0532 (Fax)

By: 

JOHN R. MOORE

State Bar No. 143248565

BRAD B. CASTLEBERRY

State Bar No. 24036339

ATTORNEYS FOR APPLICANT

FARMERSVILLE INVESTORS, LP

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2011, a true and correct copy of the foregoing Applicant's Response to Exceptions was provided by U.S. mail, hand-delivery or facsimile to the persons listed below:

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

FOR THE STATE OFFICE OF ADMINISTRATIVE HEARINGS:

The Honorable Sharon Cloninger
Administrative Law Judge
P. O. Box 13025
Austin, Texas 78711-3025
Tel: (512) 475-4993
Fax: (512) 475-4994

REPRESENTING THE EXECUTIVE DIRECTOR:

Kathy Humphreys, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3417
Fax: (512) 239-0606

REPRESENTING THE PUBLIC INTEREST COUNSEL:

Amy Swanholm, Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363
Fax: (512) 239-6377

REPRESENTING THE PROTESTANTS:

Richard Lowerre
Marisa Perales
Attorney At Law
Lowerre, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
Tel: (512) 469-6000
Fax: (512) 482-9346



JOHN MOORE